IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-4471

WILLIAM G. MILLIKEN, Governor of the State of Michigan; FRANK J. KELLEY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate; JOHN W. PORTER, Superintendent of Public Instruction of the State of Michigan, and ALLISON GREEN, Treasurer of the State of Michigan,

Petitioners,

- vs -

RONALD BRADLEY and RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCH GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN; KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBUR BLAKE, parents; all parents having

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Gerald F. Young
George L. McCargar
Mary Kay Bottecelli
Assistant Attorneys General

Attorneys for Petitioners

Business Address:
750 Law Building
525 West Ottawa Street
Lansing, Michigan 48913

Dated: September 24, 1976.

children attending the public schools of the City of Detroit, Michigan, on their own behalf and on behalf of their minor children, all on behalf of any person similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH; BOARD OF EDUCATION OF THE CITY OF DETROIT, a school district of the first class; DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondents.

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CITATIONS

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Petitioners,

v

RONALD BRADLEY, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners William G. Milliken, Governor of the State of Michigan; Frank J. Kelley, Attorney General of the State of Michigan; Michigan State Board of Education, a constitutional body corporate; John W. Porter, Superintendent of Public Instruction of the State of Michigan, and Allison Green, Treasurer of the State of Michigan, pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 4, 1976.

OPINIONS AND ORDERS OF THE COURTS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit, not yet reported, appears in the Appendix to Petition, filed herewith, at pages 151a-190a. [1]

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[1] Hereafter, references to the Appendix to Petition will be indicated by page numbers enclosed in parentheses.

Other Opinions and Orders delivered in the Courts below are:

United States District Court for the Eastern District of Michigan, Southern Division:

May 21, 1975, Order for Acquisition of Transportation, not reported. (1a-2a).

August 14, 1976, Memorandum, Opinion and Remedial Decree (Findings of Fact and Conclusion of Law), 402 F Supp 1096. (7a-88a).

August 15, 1975, Partial Judgment and Order, not reported. (89a-101a).

November 4, 1975, Memorandum and Order [Desegregation Plan], 411 F Supp 943. (103a-111a).

November 20, 1975, Order [Desegregation Plan], not reported. (113a).

May 11, 1976, Memorandum, Order, and Judgment [Educational Components], not reported. (115a-144a).

May 11, 1976, Judgment [Educational Components], not reported. (145a-149a).

United States Court of Appeals for the Sixth Circuit:

June 19, 1975, Order [Acquisition of Transportation], 519 F2d 679. (3a-6a).

August 4, 1976, Notice of Entry of Judgment, not reported. (191a).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 4, 1976. (191a). This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

I.

Whether, in the absence of any finding of a constitutional violation with respect to educational programs in the Detroit school system, the lower courts exceeded the limits of their authority in the remedy proceedings of this school desegregation case by ordering a system wide expansion of existing educational programs in the Detroit schools?

II.

Whether, in the absence of any finding of a constitutional violation with respect to Michigan's system of financing public education, the lower courts' decisions compelling defendants in the executive branch of state government to pay out 5.8 million dollars, or more, in additional, unappropriated funds from the State Treasury to defray the cost of court ordered educational program expansion in the Detroit school system are contrary to the Constitution and the decisions of this Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendments, Article X — "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendments, Article XI — "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Amendments, Article XIV, Section 1 — "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Court has previously had this case in *Milliken* v. *Bradley*, 418 US 717 (1974), reversing and remanding 484 F2d 215 (CA6, 1973). In that case, the Court answered in the negative the question of "whether a federal court may impose a multi district, areawide remedy to a single-district *de jure* segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding

that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in the public school, [and] absent any finding that the included districts committed acts which effected segregation within the other districts . . ." 418 US at 721.

In that opinion the Court defined the constitutional right of the plaintiffs as follows:

> "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." 418 US at 746

The Court concluded its opinion by saying:

> "Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion leading to prompt formulation of a decree directed to *eliminating the segregation found to exist* in Detroit city schools . . ." (Emphasis supplied) 418 US at 753

The segregation found to exist was the separation of pupils on the basis of race in the Detroit city schools. See, e.g., 418 US at 725-728.

Upon receipt of the Court's mandate from the Court of Appeals, the District Court [2] ordered the plaintiffs and the Detroit Board to submit desegregation plans and ordered the State Board to submit a critique of the Detroit Board's

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2 Honorable Robert E. DeMascio to whom the case was assigned after the death of Honorable Stephen J. Roth on July 11, 1974 (155a).

plan. [3] (13a). The plan submitted by the Detroit Board was characterized by the District Court as follows:

> "The plan . . . contained many components that were vague or poorly documented. Costs for these components, including transportation, were excessive. The defendant Detroit Board sought to add 3,416 new employees, many at salaries well in excess of those paid to its more experienced and tenured teachers. Moreover, the plan failed to inform the Court of the extent to which each of the components might presently exist in the school system . . ." (13a).

The District Court characterized the plaintiffs' desegregation plan as follows:

> " . . . *The plan . . . deals solely with pupil reassignment*. The rationale and the ultimate goal of the plan are that, as far as possible, every school within the district must reflect the racial ratio of the school district as a whole within the limits of 15 percentage points in either direction . . ." (Emphasis supplied) (24a).

Plaintiffs' plan was consistent, at least, with the theory of their complaint. [4] As the Court noted in *Milliken* v *Bradley*, *supra*, 418 US at 723:

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Petitioners Milliken, et al, defendants below, will be called collectively, "Milliken, et al", and individually by the title of their offices, i.e. "Governor", "State Board", etc; respondents Bradley, et al, plaintiffs below, will be called "plaintiffs"; respondent Board of Education of the School District of the City of Detroit, defendant below, will be called "Detroit Board."

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Although plaintiffs have filed with the District Court amended complaints alleging claims for multi-district relief, see *Bradley* v *Milliken*, 411 F Supp 973 (ED Mich, 1975), the original prayer for Detroit-only relief has never been amended. The Court's comment in *Milliken* v *Bradley*, supra, 418 US at 752 n 24, is particularly appropriate, *viz*: "Apparently, when the District Court, *sua sponte*, abruptly altered the theory of the case . . ., neither the plaintiffs nor the trial judge considered amending the complaint to embrace the new theory."

> " . . . The complaint also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office, and called for the implementation of a plan that would eliminate 'the racial identity of every school in the [Detroit] system and . . . maintain now and hereafter a unitary, nonracial school system.' "

Hearings on the desegregation plans commenced on April 29, 1975 and concluded with the final arguments of counsel on June 26-27, 1975. During the course of the hearings, on motion of the plaintiffs, the District Court, on May 21, 1975, entered an order requiring Milliken, et al, at their cost, no later than May 28, 1975, to acquire 150 school buses "to be used in the Detroit Desegregation Plan to be implemented by order of the Court." (1a). On the appeal of Milliken, et al, the Court of Appeals modified the District Court's Order by requiring that the acquisition be made by the Detroit Board and that Milliken, et al, pay or reimburse the cost of acquisition to the extent of 75%.[5] (5a). The Detroit Board's petition for a writ of certiorari to review the Court of Appeal's Order was denied. 423 US 930 (1975).

On August 15, 1975, the District Court filed its Memorandum Opinion and Remedial Decree (7a), and its Partial Judgment and Order (89a). With respect to pupil

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In that opinion, the Court of Appeals stated that the "modification is based upon the representations . . . made by the State defendants and is consistent with the spirit and purposes of the constitutional and statutory provisions and the case law of the State of Michigan." (4a). As the Court recognized in *Milliken* v *Bradley*, 418 US at 742 n 20, the plenary power to acquire transportation and to transport under Michigan law is vested in the local school district, i.e., the Detroit Board. Under the provisions of the state school aid act, 1972 PA 258, § 71, as amended by 1975 PA 261; MCLA 388.1171; MSA 15.1919(571), local school districts are reimbursed from legislative appropriations in an amount not to exceed 75% of the actual cost of transportation, including the acquisition cost of the motor vehicle.

reassignment, the District Court rejected the plans submitted by plaintiffs and the Detroit Board, and ordered the Detroit Board and its staff "in cooperation with the court's appointed experts" to prepare a revised desegregation plan, "which plan shall incorporate the guidelines contained in Section V 'Remedial Guidelines' of the court's Memorandum Opinion." (89a).

Although expressly noting that the plan submitted by the Detroit Board did not distinguish between those components that were necessary to the successful implementation of a desegregation plan and those that were not (35a), nevertheless, the District Court deemed it essential to mandate twelve of the thirteen components included in the Detroit Board's plan and added one of its own, comprehensive reading. (36a-37a, 72a-83a).

Notwithstanding the affirmative holding that the Detroit schools were not *de jure* segregated with respect to faculty and staff, *Bradley* v *Milliken*, 338 F Supp 582, 589-591 (1971) (Roth, J.), aff'd 484 F2d 515 (CA 6, 1973), the District Court in effect reserved its ruling on faculty reassignment, opining as to "the necessity of having a proper racial mix among teaching staff of the school district." (43a). By Order dated August 28, 1975, the District Court directed that "teachers in the Detroit School System shall be reassigned insofar as necessary . . . to achieve a distribution of not more than 70% of teachers of one race in each school." (180a-181a). The Court of Appeals vacated the August 28, 1975 Order and remanded for the hearing of evidence on the issue of faculty assignment, but it affirmed the authority of the District Court "as an equitable remedy to order the reassignment of faculty." (182a).

The District Court's Partial Judgment and Order of August 15, 1975 (89a), was a parallel to its Memorandum Opinion and Remedial Decree. Insofar as it relates to this

petition, the Partial Judgment and Order directed the Detroit Board and the State Board to formulate and devise a comprehensive testing program in the Detroit school system (95a), and directed the Detroit Board to institute comprehensive programs for inservice training, counseling and career guidance, testing, (95a), and a "comprehensive instructional program for teaching reading and communication skills" in every school in the system. (92a).

Pursuant to the Partial Judgment and Order, the Detroit Board submitted a revised desegregation plan on September 19, 1975, and a revision thereof on October 21, 1975. (104a). By a Memorandum and Order dated November 4, 1975, the District Court ordered the Detroit Board to implement the desegregation plan on or before the beginning of the winter semester, 1976. (109a). By a Judgment entered on November 20, 1975, the District Court, inter alia, confirmed the November 4, 1975, Memorandum and Order. (113a).

In broad outline, the plan adopted by the District Court required the reassignment of 27,524 students, of whom 21,853 would require bus transportation. The plan changed the racial balance in 105 schools out of approximately 300 zoned schools in the system (161a). An additional 100 buses were ordered to be acquired and paid for on the same basis as the initial 150 buses. (Id). The desegregation plan was effectuated by the Detroit Board at the beginning of the second semester, January, 1976, without untoward incident. (162a).

While the plan for school desegregation was processed the parties responded in compliance with the Partial Judgment and Order of August 15, 1975, by filing the requisite submissions with respect to those educational components that are the subject matter of this petition for review, to wit: reading and communication skills, in-service training,

testing, and counseling and career guidance. [6] At various times, the District Court entered orders approving the submissions and ordering their implementation.

On May 11, 1976, while appeals were pending in the Court of Appeals by plaintiffs, the Detroit Board and the intervenor Detroit Federation of Teachers from the August 14, 1975, Partial Judgment and Order and other Orders subsequently entered based on the August 15, 1975 Memorandum Opinion (7a), the District Court filed a Memorandum, Order, and Judgment (115a) and entered "our final Judgment in this matter." (145a). Insofar as it relates to this petition, the Judgment ordered into effect in the Detroit school system on or before the September, 1976 school term expanded "comprehensive programs for: a) Reading and Communications Skills, b) In-Service Training, c) Testing, [and] d) Counseling and Career Guidance", and ordered petitioners Milliken, et al, to defray one-half the additional cost thereof by the payment to the Detroit Board of additional, unappropriated funds from the State Treasury. [7] (146a-147a).

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The reading and communication skills, in-service training and counseling and career guidance submissions were filed by the Detroit Board. The testing submission was a joint effort by the Detroit Board and the State Board. No hearings were held with respect to any of these submissions, or their implementation, except that the District Court conferred with counsel and other representatives of the parties on March 12, 1976. No stenographic record was made of that conference.

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Although this petition is concerned solely with these four so-called educational components, a fifth "component", vocational education centers, requires some explanation because of the District Court's reference thereto in the Memorandum, Order and Judgment of May 11, 1976. (117a-119a). The District Court attempted to equate the vocational education centers with the four components. There is no relationship. For a number of years, the State Board has urged the Detroit Board to establish vocational education centers. The federal vocational education funds that the State Board agreed by its adopted motion and by stipulation to allocate to the Detroit Board were the funds available to the State Board for allocation on a 50% matching basis to school districts under state and federal law and the state plan for vocational education. See the Vocational Education Act of 1963; 77 Stat 403 *et seq*, as amended; 20 USC 1241 *et seq*. These funds would have been available to the Detroit Board if it had gone forward with a plan for vocational education centers and had made application therefor. The Detroit Board had received substantial amounts of federal vocational education construction funds in the past when it had made application therefor.

The stipulation, paragraph 3 (140a), expressly recites that state and federal statutes, rules and regulations will control the implementation of the Boards' adopted motions and that title to the centers, paragraph 5 (140a), will be vested in the Detroit Board. In short, the vocational education centers are the antithesis of the four components. The establishment of the centers, pursuant to the stipulation is consistent with state laws, the plenary power of the Detroit Board and the deeply rooted tradition in public education of local control over the operation of schools. See *Milliken* v *Bradley*, *supra*, 418 US at 742-743. The cost of the centers is not being defrayed by additional, unappropriated state funds, but from federal funds allocable to the Detroit Board pursuant to law. And the establishment of the centers is an *educational* objective which the State Board, over many years, has urged the Detroit Board to undertake.

Pursuant to the Judgment (146a-147a), the Detroit Board submitted to the State Board "it's highest budget allocated in any year for each of the above-enumerated quality education components" and computed "the excess cost in addition thereto occasioned by the specific implementation of the [four] court-ordered programs." The highest budget allocated for each of the four components was in the 1975-76 school year and in that year the Detroit Board's budget allocations were as follows:

Reading	$63,427,000
In-Service	715,000
Testing	1,440,000
Counseling	10,407,000
Total	**$75,989,000**

The "excess cost in addition thereto" was set forth as follows:

Reading	$ 4,600,000
In-Service	2,454,000
Testing	539,000
Counseling	4,052,000
Total	**$11,645,000**

Thus, the District Court ordered Milliken, et al, to pay to the Detroit Board unappropriated state funds in the amount of 5.8 million dollars in addition to the estimated 192.5 million dollars of appropriated funds (an increase of approximately 28.5 million dollars over 1975-76) that the Detroit Board will receive in state school aid in the 1976-77 school year. 1972 PA 258, as amended by 1976 PA 258; MCLA 388.1101 *et seq*; MSA 15.1919 (501) *et seq*. The purpose of the payment is to defray one-half the cost of expanding system-wide components currently existing system-wide in the Detroit schools at an admitted expenditure in the amount of 75.9 million dollars. [8] Further, the four components were finally ordered to be placed in effect some nine months after the desegregation plan for pupil reassignment had been implemented "in an orderly manner and in a spirit of community cooperation, without substantial disruption or disorder." (162a). Finally, it should be noted that although the desegregation plan "changed the racial balance in 105 schools out of approximately 300 zoned schools" (161a), the District Court's Judgment mandated *district-wide* expansion of the four components. (146a-147a).

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8 In the 1974-75 school year, the Detroit school district ranked 72nd from the top in educational expenditures (current operating expenditure per pupil) among Michigan's 530 K-12 school districts. In terms of local tax effort, the Detroit Board levied 22.51 mills for school operating purposes as compared with a state-wide average levy of 27.1 mills. The figures for 1975-76 have not yet been compiled.

The Court of Appeals affirmed the District Court's ordering of the expansion of existing, system-wide components (170a-171a), and affirmed "the judgment relating to the costs of the plan, but without prejudice to the *right* of the District Court to require a larger proportionate payment by the *State of Michigan* if found to be required by future developments." (emphasis supplied) (180a). In effect, the Court of Appeals drew a sight draft on the treasury of the State of Michigan and affirmed the "right" of the District Court to fill in the amount.

On motion of Milliken, et al, the Court of Appeals granted a stay of its mandate "to the extent of 15 days from date in order to allow movant to seek a stay from the Supreme Court or a Justice thereof." (Order filed August 20, 1976) On September 1, 1976, Mr. Justice Stewart denied the application of Milliken, et al, for a stay pending the filing of a petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

IN THE ABSENCE OF ANY ADJUDICATED CONSTITUTIONAL VIOLATION WITH RESPECT TO EDUCATIONAL PROGRAMS IN THE DETROIT SCHOOL SYSTEM, THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS ORDERING THE SYSTEM WIDE EXPANSION OF EXISTING EDUCATIONAL PROGRAMS IS BASED UPON AN ERRONEOUS LEGAL STANDARD THAT IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT.

This Court enunciated the following legal standard in *Milliken* v *Bradley*, *supra*, 418 US, at 744:

"The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S., at 16 . . ."

In the instant cause, there has not been any adjudicated constitutional violation with respect to educational programs in the Detroit school system. *Milliken* v *Bradley*, *supra*, 418 US, at 724-736.

Indeed, during oral argument in the remedial phase of this cause, plaintiffs' counsel stated the following:

". . . The first thing we should say about the components is that under those circumstances do we, nor may this Court accept those components as a substitute for achieving the constitutional remedies required by the constitutional violations. The violations were not with respect to the absence of guidance counsellors, they were not with respect to the absence of certain testing components, they were not with respect in-service training, they were not with respect to the absence of career education, or student rights, or school community relations . . ." (June 26, 1975, Transcript, p 131)

The reply brief filed in the Sixth Circuit by defendant, Detroit Board of Education, the moving party behind the so-called "educational components," states, at p 6, that "it does not necessarily follow that since there has been no specific finding of a constitutional violation in the areas included in the educational components, therefore, these components are automatically excluded from a remedy designed to cure the constitutional violation of segregated schools." Thus, such Board makes no claim of any adjudicated constitutional violation as to the scope or

content of the reading, in-service training, testing or guidance and counseling programs conducted by it in the Detroit school system.

In the brief filed by plaintiffs Bradley, et al, in the Sixth Circuit, at p 5 n 6, the following appears:

"The district court has attached undue significance to ruling on matters *wholly unrelated* to desegregation of students and faculty in schools. See e.g. Memorandum and Order, July 3, 1975 (student code of conduct); Memorandum Opinion and Remedial Decree, August 16, 1975, at 99-119 ('educational components' of desegregation)." (emphasis added)

Thus, it is beyond dispute that there are no constitutional violations with regard to educational programs in the Detroit school system. Further, as accurately stated by plaintiffs, Bradley, et al, on whose behalf the case was brought, the "educational components" are "wholly unrelated" to desegregation of pupils in Detroit's schools.

Nevertheless, the Sixth Circuit sustained the inclusion of the four components here at issue by affirming the trial court's purported finding of fact that the components are needed to remedy past segregation, to successfully desegregate and to help avoid resegregation. (170a). This is the same approach previously used by the lower courts in purporting to make factual findings that the Detroit school system could not be desegregated within Detroit. This Court properly reversed the lower courts on that issue, holding that they had employed an erroneous legal standard in seeking to achieve the racial balance they deemed desirable. *Milliken* v *Bradley*, *supra*, 418 US, at 739-747, 752-753. So here, the lower courts used an erroneous legal standard in compelling educational program expansions in the absence of any underlying constitutional violation with respect to such educational programs in the Detroit school system.

The Sixth Circuit cites only one case, *Brown* v *Board of Education*, 347 US 483 (1954), in support of its inclusion of expanded educational programs in the desegregation remedy herein. (168a-172a). However, in *Brown* v *Board of Education*, 349 US 294, 300-301 (1955), dealing with remedy, there is no suggestion that system wide expansion of educational programs is to be a part of a school desegregation remedy.

Moreover, in the 22 years since *Brown, supra*, there have been hundreds of school desegregation remedies that have satisfied the requirements of the Constitution without the inclusion of so-called "educational components." In fact, the trial court in this cause ruled that "[t]here no longer is a denial of their right to equal protection when there are no schools from which they are excluded." (62a).

As this Court noted in *Brown, supra*, 349 US, at 300, "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." More recently, in *Swann* v *Charlotte-Mecklenburg Board of Education*, 402 US 1, 23 (1971), this Court observed that "[o]ur objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race." With regard to the operation of schools, other than pupil reassignment, this Court stated that "normal administrative practice" should suffice. *Swann, supra*, 402 US, at 18-19.

Most recently, in *Pasadena City Board of Education* v *Spangler*, ___ US ___; 96 S Ct 2697, 2705 (1976), this Court ruled as follows:

> ". . . For having once implemented a racially neutral attendance pattern in order to remedy the perceived

> constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."

Manifestly, the appropriate remedy for unlawful pupil assignment practices is pupil reassignment rather than court ordered expansion of existing educational programs.

The judicial task is to correct the condition that offends the Constitution. *Swann, supra*, 402 US, at 16. Here, there is no condition that offends the Constitution with respect to the scope and content of educational programs in the Detroit school system. Thus, that portion of the unprecedented remedy ordered below dealing with expanded educational programs for in-service training, testing, reading and guidance and counseling is contrary to the decisions of this Court in *Brown, supra, Swann, supra, Milliken, supra*, and *Spangler, supra*.

The Sixth Circuit's inclusion of expanded educational programs in the remedy here is in conflict with the decision of the Tenth Circuit Court of Appeals in *Keyes* v *School District No 1, Denver, Colorado*, 521 F2d 465, 480-483 (CA10, 1975), *cert den*, 423 US 1066 (1976). In that case, the Court vacated that portion of the trial court's order compelling the establishment of educational programs tailored to the needs of minority children, noting the lack of relationship between the constitutional violation, discriminatory pupil assignment, and the court ordered relief, establishment of educational programs.

The cases of *Hart* v *Community School District of Brooklyn, New York School District No 21*, 383 F Supp 699 (ED NY, 1974), *aff'd*, 512 F2d 37 (CA2, 1975), and *Morgan* v *Kerrigan*, 530 F2d 401 (CA1, 1976), *cert den*, ___ US ___; 96 S Ct 2648, 2649 (1976), dealt with magnet schools

having special programs to attract students as a part of pupil reassignment. In contrast, here we have the court ordered expansion of existing educational programs on a system wide basis that far exceeds in scope the number of schools involved in pupil reassignment, without any prior finding of a violation in the scope and content of educational programs in the Detroit school system.

The question of whether to expand existing educational programs in the Detroit school system is reposed in the sound discretion of the Detroit Board of Education, consistent with its available financial resources. *Milliken* v *Bradley, supra* 418 US, at 742 n 20. Moreover, this Court has held that there is no constitutional right to any particular level of educational programming and funding of same in the public schools, noting that there is no consensus in this area that more is always better. *San Antonio Independent School District* v *Rodriguez,* 411 US 1, 43 (1973). Proposed changes in public education are important matters to be debated and acted upon by concerned citizens, parents, school official and elected representatives in the democratic political processes rather than by the federal courts.

In summary, the unprecedented inclusion of expanded system wide educational programs in the remedial orders below, unsupported by any constitutional violation as to existing educational programs, is contrary to the decisions of this Court and other courts of appeals. Thus, this Court should grant the petition for a writ of certiorari to review the decision below.

II.

IN THE ABSENCE OF ANY FINDING OF A CONSTITUTIONAL VIOLATION WITH RESPECT TO MICHIGAN'S SYSTEM OF FINANCING PUBLIC EDUCATION, THE LOWER COURT'S UNPRECEDENTED DECISION COMPELLING DEFENDANTS IN THE EXECUTIVE BRANCH OF STATE GOVERNMENT TO PAY OUT 5.8 MILLION DOLLARS OR MORE IN ADDITIONAL, UNAPPROPRIATED FUNDS FROM THE STATE TREASURY IS CONTRARY TO THE CONSTITUTION AND THE DECISIONS OF THIS COURT.

Assuming, *arguendo,* that the lower courts did not exceed their remedial authority in ordering the expansion of existing educational programs, the question still remains whether the lower courts may, consistent with the Constitution and the decisions of this Court, compel defendants in the executive branch of state government to pay out 5.8 million dollars or more in additional, unappropriated funds from the State Treasury to defray the cost of such court ordered program expansion. It is one thing for the courts to become the arbiters of curriculum in school desegregation cases within the limits of appropriated local and state funds. It is another matter for the courts to also usurp the powers of state legislatures over appropriating state funds in school desegregation cases.

Again, at the threshold we are confronted with the reality that there has been no adjudication herein that the Michigan system of financing public education violates the Constitution under this Court's controlling decision in *Rodriguez, supra. Milliken* v *Bradley, supra,* 418 US, at 751-752. [9] Thus,

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9 During the remedy hearings below, plaintiffs' counsel stated ". . . This, I repeat, is a desegregation case. It is not a school finance case . . ." (June 26, 1975, Transcript, p 8).

there is no adjudicated violation in this case in the areas of educational programs or school finance that might justify the unprecedented financial relief ordered below against the State of Michigan and its treasury. (180a).

The Sixth Circuit decision below cites no case law in which the federal courts have ordered officials in the executive branch of state government to pay out additional, unappropriated funds from the State Treasury for the cost of court ordered educational program expansion. [10] (172a-180a). This unprecedented expansion of the power of the federal courts over the states, their treasuries and the right of the people in each state to have their state tax dollars appropriated by their elected representatives should not come to pass without prior review by this Court.

Recently, this Court held, in *National League of Cities* v *Usery*, US ; 96 S Ct 2465 (1976), that the power of the Congress under the Commerce Clause did not, because of the Tenth Amendment, extend to imposing minimum

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By way of illustrative example, the Court of Appeals cites *Scheuer* v *Rhodes*, 416 US 232, 238 (1974), a case in which this Court held that the Eleventh Amendment was not a bar to a civil action against state officers for money damages to be paid by the individual defendants rather than from the State Treasury. The Sixth Circuit also referred to *Cooper* v *Aaron*, 358 US 1 (1958), which involved the blatant disregard by state officers of a Supreme Court decision, a situation which has no relevance to the position of Milliken, et al. No court order has been, or will be, disobeyed. Moreover, *Cooper, supra*, did not in any way consider the power of a federal court to order payment of state funds in light of the Eleventh Amendment. The Court of Appeals relied heavily on *Wyatt* v *Aderholt*, 503 F2d 1305, 1318-1319 (CA5, 1974). However, a reading of that case reveals that no coercive relief was granted compelling the payment of funds from the State Treasury. In *Wright* v *Houston Independent School District*, 393 F Supp 1149, 1155 (SD Tex, 1975), the basic question was whether the local school district could be considered a state agency for Eleventh Amendment purposes.

wage requirements on the states and their political subdivisions. In reaching that result, this Court noted the financial impact of such requirement on state governments and concluded its opinion with the following:

> "But we have reaffirmed today that the States as States stand on a quite different footing than an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from *United States* v. *California*, simply wrong. Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow 'the National Government [to] devour the essentials of state sovereignty,' 392 U.S., at 205, 88 S. Ct., at 2028, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause. While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled."
> ___ US ___; 96 S Ct, at 2475-2476

So here, the Tenth Amendment is also a limitation on the power of the federal courts to force their choices upon the states as to the conduct of integral governmental functions, including the appropriation of finite state tax dollars among competing demands from all levels of public education and the myriad of other governmental programs and services financed with state legislative appropriations. *Bradley* v *School Board of Richmond, Virginia*, 462 F2d 1058, 1068

(CA 4, 1972) aff'd by equally divided court, 412 US 92 (1973). *National League of Cities* v *Usery*, *supra*.

In *Griffin* v *County School Board of Prince Edward County*, 377 US 218, 233 (1964), this Court ruled that "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." Thus, there this Court directed local officials to exercise their lawful powers under state law to levy local taxes to reopen the public schools free from racial discrimination.

Here, in contrast, the lower courts have ordered petitioners Milliken, et al, to pay out additional, unappropriated funds from the State Treasury for court ordered program expansions in contravention of their lawful powers under state law. Under Michigan law, only the legislature may appropriate state funds. Mich Const 1963, art 9, § 17; [11] *Regents of University of Michigan* v *Labor Mediation Board*, 18 Mich App 485, 490; 171 NW2d 477, 479 (1969).

In *Edelman* v *Jordan*, 415 US 651 (1974), this Court held that the Eleventh Amendment precluded the federal courts from ordering the payment of welfare benefits from the State Treasury even though such benefits had been wrongfully withheld. In reaching that result, the Court noted, at p 667 n 12, that *Griffin*, *supra*, involved an order directed to county officials that did not fall within the ambit of the Eleventh Amendment's jurisdictional bar.

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"No money shall be paid out of the state treasury except in pursuance of appropriations made by law."

In this case, the decree sought to be reviewed does not direct state officials to alter their previous course of conduct, in compliance with a substantive federal-question determination concerning pupil assignment in the Detroit schools, with an ancillary effect on the State Treasury. Rather, the decree sought to be reviewed directly commands "the State of Michigan" to pay out millions of dollars in additional, unappropriated state funds for court ordered program expansion, to remedy the claimed effects of its alleged prior wrongdoing with regard to pupil assignment. (180a). It is, in practical effect, indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials. Therefore, such decree is precluded under this Court's holding in *Edelman* v *Jordan*, *supra*, 415 US, at 668.

The order below has a most detrimental effect on the fiscal integrity of the State of Michigan. At the close of the 1974-1975 fiscal year, June 30, 1975, the balance in the State of Michigan's general fund was only 1.6 million dollars. The 1975-1976 state fiscal year has been extended to September 30, 1976, in an attempt to balance the state's budget for the fiscal period as required by Mich Const 1963, art 5, § 20. [12] The most recent estimate provided the Michigan legislature by the Michigan Budget Director is that, as of September 30, 1976, the state's general fund will have a deficit of 1.9 million dollars. The decision below will superimpose upon this

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"No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes."

strained fiscal situation the added obligation to pay out an additional 5.8 million dollars or more, thereby increasing the likelihood that the State of Michigan will have a substantial deficit for the extended 1975-1976 fiscal year. This result, we submit, is what the Eleventh Amendment was intended to preclude.

In the 1974-75 fiscal year, the Detroit school system, with a current operating expenditure per pupil of $1,271.40, ranked 72nd from the top among Michigan's 530 K-12 school districts. Recent data submitted to the Michigan Department of Education by the Detroit Board of Education on August 20, 1976, reveals that, at the close of the 1975-1976 school fiscal year, the Detroit Board of Education had a general fund equity surplus of 5 million dollars to carry forward into the 1976-1977 school fiscal year with projected total resources of approximately 393 million dollars for such school fiscal year. Thus, it is readily apparent that, contrary to the self-serving portrayal of economic deprivation submitted below by the Detroit Board of Education and adopted by the Sixth Circuit, the Detroit school system has been financially sound in recent years even though it has not made even an average local tax effort for school operating purposes.

Although the Detroit school system finished the 1975-1976 school fiscal year on June 30, 1976, with a general fund surplus of approximately 5 million dollars, the Detroit Board of Education has estimated that it will not be able to maintain existing program levels for the 1976-1977 school fiscal year. This financial problem, to the extent it exists, is directly attributable to the unwillingness of the voters to approve an increase in the property tax rate limitation for school operating purposes in the Detroit school system.

Michigan's system of financing public education includes both local property tax revenues and legislative appropriations of state school aid funds to school districts. Mich Const 1963, art 9, §§ 6 and 11. Michigan has adopted a modified district power equalizing system of school finance which encourages and rewards local tax effort by guaranteeing a fixed level of funding per pupil in combined state and local funds for each mill of school operating property taxes levied at the local level.

Pursuant to recent statutory amendments to the state school aid act, the Detroit school system will receive approximately 192.5 million dollars in legislatively appropriated funds for the 1976-1977 school fiscal year, an increase of approximately 28.5 million dollars over its 1975-1976 state school aid funding. 1972 PA 258, as last amended by 1976 PA 258; MCLA 388.1101 *et seq*; MSA 15.1919(501) *et seq*. Thus, this is not a case in which appropriations have been reduced to interfere with desegregation. [13]

The current property tax rate for school operating purposes in the Detroit school system is below the state wide average for Michigan's school districts. On August 3, 1976, the voters in the Detroit school system failed to approve a tax rate increase for school operating purposes. The Detroit Board of Education will hold another millage election in November, 1976, and, in the event the millage increase is approved, may levy the increase and receive the additional revenue for the 1976-1977 school fiscal year.

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13 The reference below to "the normal share of State school aid funds provided to Detroit" (178a) is misplaced. There is no normal share of state aid funds provided Detroit, but only the amount each year which the Detroit school system is entitled to receive based upon the statutory appropriation and allocation formulas enacted by the legislature in 1972 PA 258, as amended, *supra*. Further, at what point, if ever, will the Michigan legislature have appropriated sufficient funds to the Detroit school system to satisfy the lower courts so that additional, unappropriated funds will not have to be disbursed to such school system?

The 5 mill increase in school operating property taxes in the Detroit school system, if approved, would generate an additional 37 million dollars in combined local property tax revenues and state school aid funds, including an additional 12 million dollars in state school aid funds by operation of law under the statutory allocation formulas enacted by the legislature to encourage and reward local tax effort. This 12 million would be in addition to the 192.5 million in state school aid funds referred to above for the 1976-1977 school fiscal year.

In *Rodriguez, supra*, 411 US, at 40-44, 49-55, this Court sustained the validity of the Texas system of financing public education, ruling that matters of state fiscal and educational policy are best determined at the state or local level under our federal system. There, this Court held that reliance on variable local school district property taxes for financing public education furthered the legitimate purpose of local control of education consistent with the Equal Protection Clause.

Here, as in *Rodriguez, supra*, we have a system of financing public education based upon a combination of local property tax revenues and legislative appropriations of state school aid. In Michigan the state school aid statute is designed to encourage and reward local tax effort for public education. As long as the prospect of increased state funding for Detroit by federal court order looms large, the voters in Detroit will lack incentive to approve property tax increases for school operating purposes. Further, Michigan's statewide system of financing public education will be disrupted, contrary to the decision of this Court in *Rodriguez, supra*.

In summary, the lower courts have assumed the role of the Michigan legislature in ordering Milliken, et al, to disburse millions of dollars in additional, unappropriated funds from

the State Treasury to pay the cost of court ordered educational program expansion in the Detroit school system. This, we submit, is contrary to the decisions of this Court in *National League of Cities* v *Usery, supra; Edelman* v *Jordan, supra,* and *Rodriguez, supra*.

III.

THE QUESTIONS RAISED HEREIN BY THE UNPRECEDENTED DECISION BELOW ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The unprecedented decision below raises fundamental questions concerning the scope of the remedial powers of the federal courts in school desegregation cases in the areas of expanded educational programming and the financing of same. The decision calls into question the violation-remedy relationship that has been the foundation of this Court's holdings in this area of the law.

In addition, the lower court decision on financing raises important questions under the Tenth and Eleventh Amendments concerning the extent to which the federal courts may take over the legislative role of appropriating and allocating state tax revenues in our federal system. Also, the decision below raises questions with regard to state systems of financing public education and this Court's decision in *Rodriguez, supra*.

From *Brown, supra*, until recently, the federal courts have not assumed the functions of controlling curriculum and regulating educational finance in school desegregation cases. If the federal courts may assume these functions, it should only be after this Court has carefully reviewed the matter

and settled the questions with some definitive guidelines, as was done in *Swann, supra,* with regard to pupil reassignment.

As this Court is aware, school desegregation cases are being litigated all across the United States. Only this Court can establish the uniform national remedial standards that are required for adjudication of these cases in a consistent manner throughout this country.

Previously in this case, the lower courts approved an unprecedented multi-district remedy to "produce the racial balance which they perceived as desirable," thereby compelling reversal by this Court. *Milliken* v *Bradley, supra*, 418 US, at 740. Under the judgment of the Court of Appeals, to produce the educational results which they perceive as desirable, the lower courts have become the educational and financial arbiters of curriculum and school finance for the Detroit school system and the State of Michigan. As in *Milliken* v *Bradley, supra,* this Court should grant appellate review of the unprecedented decision below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Sixth Circuit rendered herein on August 4, 1976.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Gerald F. Young
George L. McCargar
Mary Kay Bottecelli
Assistant Attorneys General

Attorneys for Petitioners
Milliken, et al

Business Address:
750 Law Building
525 West Ottawa Street
Lansing, Michigan 48913

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